99 617 OCT 8 199

OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Neo Gen Screening, Inc.
Petitioner,

v.

New England Newborn Screening Program,
University of Massachusetts, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Counsel of Record

KENNETH P. MCKAY, ESQ.
LAW OFFICES OF
K. PATRICK MCKAY, PE, ESQ.
UNICORN PROFESSIONAL PLAZA
3755 LIBRARY RD.
PITTSBURGH, PA. 15234-2266
412-344-6113

QUESTION PRESENTED

May a state executive agency be shielded from liability under the Sherman Anti-Trust Act, 15 U.S.C. § 1, through Eleventh Amendment Immunity, where acting without a clear articulation of legislative authority, in issuing regulations which establish a monopoly over private competition, in a commercial area previously not subject to anti-competitive restrictions, where the executive agency competitively participates in foreign markets in the same enterprise?

PARTIES TO THE PROCEEDINGS

Petitioner

Neo Gen Screening, Inc., a Pennsylvania Closed Corporation.

Corporate Disclosure Statement

Petitioner, Neo Gen Screening, Inc. avers under Rule 29.1 that there is no parent or publicly held company owning any of the corporation's stock.

Respondents

The New England Newborn Screening Program, established by contract between the University of Massachusetts Medical School and the Massachusetts Department of Public Health, The Massachusetts Department of Public Health, Howard Koh, Commissioner and Ralph Timpiri, Assistant Commissioner, and the University of Massachusetts.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

ARGUMENT FOR GRANTING THE WRIT 6

ARGUMENT 1
The Limits of the State Action Doctrine, For Purposes of State Agency Immunity, Have Not Been Set By This Court, and The Circuit Courts Reflect This Division. 9

ARGUMENT 2
The Balancing of Federalism's Control of Anti-Competitive Activity And State Sovereignty Is Best Achieved By Closer Scrutiny of State Agency Action. 13

ARGUMENT 3
The Position of Massachusetts, As A Market Participant, Distinguishes This Case From One of Pure State Action Immunity. 16

CONCLUSION 17

APPENDIX 19

Appendix A
First Circuit Opinion, July 14, 1999 1a

Appendix B
District Court Memorandum and Order On Motion to Dismiss, December 3, 1998 13b

TABLE OF AUTHORITIES

Cases

Bates v. State Bar of Arizona,
433 U.S. 350 (1977) 9

Brazil v. Arkansas Bd. of Dental Examiners,
593 F. Supp. 1354 (E.D. Ark. 1984) 14

Charley's Taxi Radio Dispatch Corp. v.
Sida of Hawaii, Inc.,
810 F.2d 869 (9th Cir. 1987) 11

Cine 42nd Street Theater Corp v.
Nederlander Org., Inc.,
7,8,11,
790 F.2d 1032 (2d Cir. 1986) 7,11,14

City of Columbia, et al. v. Omni
Outdoor Advertising, Inc.,
499 U.S. 365 (1991) 16,17

City of Lafayette v. Louisiana Power &
Light,
435 U.S. 389 (1978) 9

Community Communications Co. v. City
of Boulder,
455 U.S. 40 (1982) 14,15

Deak-Perera Hawaii, Inc. v.
Department of Transportation,
745 F.2d 1281 (9th Cir. 1984),
cert. denied, 470 U.S. 1053 11,12

First Am. Title Co. v. South Dakota Land Title Ass'n, 714 F.2d 1439 (8th Cir. 1983) 13

Hoover v. Ronwin, 466 U.S. 558 (1984) 7,9,10, 11,14, 15

Hybud Equip. Corp. v. City of Akron, 742 F.2d 949 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 1866 (1985) 14

Parker v. Brown, 317 U.S. 341 (1943) 10

Racetrac Petroleum, Inc. v. Prince George's County, 601 F.Supp. 892 (D. Md. 1985) 15

Saenz v. University Interscholastic League, 487 F.2d 1026 (5th Cir. 1973) 11

Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985) 8,12, 14

Statutes

U.S. Const., art. XI 1

15 U. S. C. §1 (1998) 2

28 U.S.C. §1254(1) (1998) 1

28 U.S.C. §2106 (1998) 1

Fed. R. Civ. P. 12(b) 3

Mass. Gen.Laws .ch. 111, § 4E (1996) 2

Mass. Gen.Laws .ch. 111, § 110A (1996) 3

Other Authority

Anti-Trust Law, Areeda & Hovenkamp, ¶ 212.2d (1996 Supp.) 8,12

Jared Ben Bobrow, Note: Antitrust Immunity For State Agencies: A Proposed Standard, 85 Colum. L. Rev. 1484 (1985) 12,13, 14

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit, No. 99-1100, dated July 14, 1999, (not reported) is included in the Appendix at Appendix A, 1a-12a. The Opinion of the District Court for the District of Massachusetts, No. 98-10394-GAO, dated December 3, 1998, (not reported) is included in Appendix B at 13b-18b.

JURISDICTION

The United States Court of Appeals for the First Circuit issued its Opinion on July 14, 1999. This Petition for Writ of Certiorari is filed within 90 days of the judgment so entered. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., art. XI

Immunity Clause

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

* * *

Sherman Anti-Trust Act

15 U. S. C. § 1

Sec. 1. Trusts, etc., in restraint of trade illegal; penalty.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

* * *

Massachusetts Statute

Mass. Gen. Laws. ch. 111, § 4E provides as follows:

The department of public health is hereby authorized and directed to establish a program to combat mental retardation in children suffering from a genetic effect causing phenylketonuria. The said program may be conducted in conjunction with any foundation or scientific organization, hospital or medical school or with any agency of the federal government. The department may accept for such purpose any special grant of money, services or property from the federal government or any of its agencies or from any such foundation, organization of medical school.

Mass. Gen. Laws. ch. 111, § 110A, provides that

> [t]he physician attending a newborn child shall cause said child to be subjected to tests for phenylketonuria, cretinism and such other specifically treatable genetic or biochemical disorders or treatable infectious diseases which may be determined by testing as specified by the commissioner. The commissioner may convene an advisory committee on newborn screening to assist him in determining which tests are necessary. The department shall make such rules pertaining to such tests as accepted medical practice shall indicate.

STATEMENT OF THE CASE

The facts of this case are undisputed.[1] Newborn screening is a blood test conducted on infants, preferably taken shortly after birth, with the intent of detecting treatable disorders, particularly phenylketonuria, congenital hypothyroidism, congenital adrenal hyperplasia, sickle cell disease and galactosemia, among others. The screening is performed on a filter paper blood specimen as it is routinely collected from the heel of every newborn at the time of discharge from the hospital.

Massachusetts, like many state governments, has historically encouraged such testing. The current art of testing, and specifically that testing done by the New England Newborn Screening Program (hereinafter "NENSP"), at the time of this suit, did not utilize modern methods of genetic disorder analysis, such as Tandem Mass Spectroscopy.

---

[1] Based on the Amended Complaint, the averments are to be assumed to be true, Fed. R. Civ. P. 12(b).

All of the testing in Massachusetts at the time of the complaint in this matter was being performed by NENSP, using current technology, as opposed to the more advanced analytical techniques employed by Neo Gen. An advantage to NENSP in position of performing services was a result of historical factors and affiliations with the Massachusetts Department of Public Health (hereinafter "DPH"), and was not due to a legally-enabled monopoly or any technical or commercial advantage. In fact, the Neo Gen testing is offered at a significantly reduced price as compared to the NENSP testing.

The DPH proposed regulations in 1989 which would, when enacted, require the testing of newborns. Those regulations list the diseases for which newborns were to be tested, and set forth the timing and procedure for testing. Those regulations did not grant an exclusive requirement to have testing performed only by the NENSP. The regulations went to hearing and were adopted by the Public Health Council in November 1989. For an undetermined reason, the Office of Massachusetts Secretary of State never published the regulations.

Accordingly, as of October 1997, the Regulations were not yet in force and effect. Because compliance with the Secretary of State's rules on publication is a "condition precedent to the effectiveness of agency regulations," the Regulations were not enforceable and were not a requisite of medical care providers in Massachusetts.

Neo Gen, in the fall of 1997, embarked upon a business program to provide newborn screening to Massachusetts' hospitals. As part, various advertising mediums were utilized, including word-of-mouth and

letters written to hospitals soliciting participation through contracts with Neo Gen.

The services of Neo Gen included screening for disorders and diseases not accommodated by other means and technologies, including those technologies and programs fostered by the DPH and offered through NENSP.

Neo Gen alleges that NENSP, through its agents, employees and/or servants influenced the DPH to issue "Emergency Regulations" which monopolize NENSP service to the detriment of Neo Gen. The Emergency Regulations bar users, particularly hospitals, from obtaining services through any entity except NENSP, in contravention of the enabling legislation and the prior regulations.

The NENSP presented in its Motion to Dismiss the affidavit of Richard J. Stanton, the Deputy Chancellor for Finance and Administration of the University of Massachusetts which controverts none of the alleged facts, but merely establishes that the NENSP is a state agency. The affidavit also establishes that the NENSP provides service to other states. The affidavit relies upon its attached agreement between UMASS and the DPH. Before the time of that agreement, newborn screening services were provided by a private organization, the Massachusetts Health Research Institute.

The Plaintiff corporation filed a complaint on March 5, 1998, which was once amended on July 31, 1998, and restricted the amended complaint to one count under the Sherman Anti-Trust Act against the Commissioner of the Massachusetts Department of Health, Howard Koh, and the Assistant Commissioner,

Ralph Timpiri, seeking prospective, injunctive relief from the implementation of the regulations, above.

The District Court granted a Motion to Dismiss for lack of jurisdiction on December 3, 1998, entered December 4, 1998, holding that the Defendants were immune under the Eleventh Amendment.

The Petitioners timely filed an appeal with the Court of Appeals for the First Circuit. On July 14, 1999, the Circuit Court affirmed the District Court's judgment, holding "Neo Gen argues that the Massachusetts legislature did not expressly approve or authorize the kind of regulation or contract involved in this case; but we have rejected a "clear articulation" test as applied to the state's executive branch, at least where a full-fledged department is concerned. Given the Commonwealth statutes that authorize testing, there is nothing extraordinary or unforeseeable about the Department of Public Health's regulation requiring testing or its decision to do the testing itself or through a chosen instrument."

The Petitioner timely files this Petition for Writ of Certiorari within 90 days of the Opinion of affirmation by the Court of Appeals.

ARGUMENT FOR GRANTING WRIT

The NENSP is nothing more than a recently concocted excuse to monopolize newborn screening in Massachusetts under an ill-begotten shield of immunity, because the state is incapable of competitively providing the requisite services, and must rely on this facade to sustain its position.

This results in not only a legal injustice, but also a huge disservice to the infants of Massachusetts. Because,

without the application of technology within the possession of Neo Gen, infants are inadequately screened, and, as a result, are dying, unnecessarily, in that state.

The First Circuit has perpetuated the monopoly in its decision that stated that Neo Gen Screening, Inc. failed to state a claim for prospective, injunctive relief under the Sherman Anti-Trust Act against the state officials of the Massachusetts Department of Health, through its subordinate contract entity, the University of Massachusetts Medical Center, conducting the NENSP. The Circuit Court's decision sustained the District Court's dismissal on the basis of Eleventh Amendment Immunity. The First Circuit clearly states its basis for affirmation, in that this Circuit has "[r]ejected a "clear articulation" test as applied to the state's executive branch."

The Court specifically relied upon sister circuit decisions in its determination, two of which extend the dicta of this Court in Hoover v. Ronwin, 466 U.S. 558 (1984), relative to the question presented here. The Second Circuit, however, places this basis in dispute, relying instead on a heightened standard for executive agencies. [2] That divergence between circuits is the essence of this Writ.

The Second Circuit, as have several lower courts, engages in inquiry when weighing the same question, implying a higher burden on an agency, or its branches. Cine 42nd Street Theater Corp v. Nederlander Org., Inc., 790 F.2d 1032, 1041 (2d Cir. 1986) [3]. Moreover, the most

---

[2] Cine 42nd Street Theater Corp.v. Nederlander Org., Inc., 790 F.2d 1032, 1041 (2d Cir. 1986).

[3] Cine does not extend the holding in the case, per se, but establishes the test in the discussion of the case at bar: "Rules of State Action Defense Summarized" . . . (3)

noted commentary in Anti-Trust law holds the matter to be reserved, and undecided. Anti-Trust Law, Areeda & Hovenkamp ¶ 212.2d (1996 Supp.).

Hoover also reiterated that immunity is not recognized for private market participation. The First Circuit abstained from deciding any "market participant" exception in this case, further additional argument made herein.

The Supreme Court has clearly reserved the Executive Branch question, even after once denying Certiorari on it. The Second Circuit fully supports a limited inquiry into articulation, where the Ninth Circuit does not. The implication of Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985) is that the Court has leaned toward this limited inquiry.

The Hoover dicta begs for clarification, and the balance of federalism and state sovereignty demands that state agency action be scrutinized with a level of inquiry cognizant of the inherent limitations of agency action, as compared to that of the legislature or the judiciary.

When a state agency, municipality, or other state subdivision claims a state immunity from federal law, it must first identify a "clearly expressed state policy" that authorizes its action, *Hallie*, at 38"; Cine at 1041.

ARGUMENT 1

The Limits of the State Action Doctrine, For Purposes of State Agency Immunity, Have Not Been Set By This Court, and The Circuit Courts Reflect This Division.

The State Action Doctrine is the overall focus of this inquiry, but only to the extent that this Petitioner seeks to have this Court define the limits on state agencies.

At one extreme of the Doctrine, this Court has firmly established that the activity of the state judiciary and the state legislature is immune from Sherman Anti-Trust liability, Bates v. State Bar of Arizona, 433 U.S. 350, (1977). At the other extreme, this Court has found that arms of the state, particularly municipalities, are immune only if they can show the activity passes the test of Parker v. Brown, and its progeny, City of Lafayette v. Louisiana Power & Light, 435 U.S. 389, (1978). [4]

This Court, however, reserved as dicta in Hoover v. Ronwin, 466 U.S. 558 (1984), the question presented here. This Petitioner directs this Court's attention back to that issue.

---

[4] The decisions establish two standards for antitrust immunity under Parker v. Brown. First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy," and second, the policy must be "actively supervised" by the State itself. See, also, City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410 (1978).

In the First Circuit Court of Appeals, No. 99-1100, decision of July 11, 1999, that Court decided that Neo Gen Screening, Inc. failed to state a claim under the Sherman Anti-Trust Act against the state officials of the Massachusetts Department of Health, through its subordinate contract entity, the University of Massachusetts Medical Center. The circuit's decision sustained the District Court's dismissal on the basis of Eleventh Amendment Immunity. The Court specifically relied upon sister circuit decisions in its determination, which extend the dicta of this Court in Hoover v. Ronwin, 466 U.S. 558 (1984), relative to the question presented here.

In the Neo Gen matter, the issue went to what the Health Department of Massachusetts had done in light of the legislative enactment governing newborn screening.[5] Neo Gen's argument before the First Circuit was that the action by the Health Department through its contract arm, the NENSP and/or UMASS, was not a "clearly articulated" authorization of the statute, required under Parker v. Brown, 317 U.S. 341 (1943).

---

[5] Neo Gen argues in Brief that the statutory provisions do not plainly show that the legislature contemplated the kind of action complained of. An examination of the Massachusetts enabling statute, as previously implemented by the Commonwealth of Massachusetts, shows that the authority to compete is not articulated by the Legislature, on two bases: the parallel articulation in similar acts, i.e., the lead screening provisions of the Massachusetts general laws, and the previous implementation of newborn screening by regulation under the same legislative enactment.

The First Circuit did not reach that point, holding that it need not do so. That Court held that such an authorization is not required, in its extension of Hoover v. Ronwin, 466 U.S. 558 (1984) to the "Executive Branch." [6] The First Circuit joined two sister circuits in that position and abstained from deciding any "market participant" exception in this case, both points to be taken on appeal, as follows.

In Hoover, the Supreme Court held that, when the activity at issue is not directly that of the **legislature or supreme court** (ipso facto immunity), but is carried out by others pursuant to state authorization, there must be a showing that the challenged conduct is pursuant to a clearly articulated state policy to replace competition with regulation, and the degree to which the state legislature or supreme court supervises its representative may be relevant to the inquiry. However, where the challenged conduct is in fact that of the state legislature or supreme court, the issues of "clear articulation" and "active supervision" need not be addressed. Hoover, at 567-569.

---

[6] In its decision, the Court relied upon other Circuits' decisions of the same matter, specifically, "Charley's Taxi Radio Dispatch Corp. v. Sida of Hawaii, Inc., 810 F.2d 869, 875-76 (9th Cir. 1987) (state department of transportation); Deak-Perera Hawaii, Inc. v. Department of Transportation, 745 F.2d 1281, 1282-83 (9th Cir. 1984) (same), cert. denied, 470 U.S. 1053 (1985); Saenz v. University Interscholastic League, 487 F.2d 1026, 1027-28 (5th Cir. 1973) (division of University of Texas); compare, Cine 42nd Street Theater Corp.v. Nederlander Org., Inc., 790 F.2d 1032, 1044-46 (2d Cir. 1986); see generally I Areeda & Hovenkamp, supra, ¶ 224b2, at 411-415; id. ¶ 212.2d (1992 Supp.)."

And as noted in the First Circuit Court's decision, the Supreme Court reserved the question of agency action: "This case does not present the issue whether the Governor of a State stands in the same position as the state legislature and supreme court for purposes of the state-action doctrine." Hoover, note 17.

Immediately after the Hoover decision, the Court denied certiorari in Deak-Perera Hawaii, Inc. v. Department of Transportation, 745 F.2d 1281, 1282-83 (9th Cir. 1984), cert. denied, 470 U.S. 1053 (1985). There, the executive department was given the same latitude that Hoover accorded the courts and legislature.

But this Court has yet to decide the question, and renewed its reservation of the issue in Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985), holding the decision as open, but reciting an interesting observation which would impose at least one of the Parker prongs on the agency. [7]

Several commentators have recognized that the courts are misconstruing the Hoover dicta, such as in the Deak-Patera matter, above (e.g., Jared Ben Bobrow, Note: Antitrust Immunity For State Agencies: A Proposed Standard, 85 Colum. L. Rev. 1484 (1985) which fosters that this construction is a clear misreading of Hoover and Hallie). Moreover, one of the most noted commentaries in Anti-Trust law holds the matter to be reserved, and undecided. Anti-Trust Law, Areeda & Hovenkamp ¶ 212.2d (1996 Supp.).

---

[7] Hallie suggests that "active supervision" could be dispensed with. Hallie, 471 U.S. at 46, n. 10.

Therefore, it is incumbent upon this Court to review the divergence of the lower courts from the precepts held by Hoover and Hallie, and to set forth, through the requested issue of Writ, the argument of this matter, forthwith.

ARGUMENT 2

The Balancing of Federalism's Control of Anti-Competitive Activity And State Sovereignty Is Best Achieved By Closer Scrutiny of State Agency Action

The standard being applied which grants state agency immunity subordinates national economic policy without furthering the principles of federalism and sovereignty upon which the Parker doctrine is based, 85 Colum. L. Rev. 1484, 1492 (1985).

Rather than granting automatic antitrust immunity to state agencies, this Court should adopt the position of lower courts which have properly adopted the state authorization approach. These courts grant antitrust immunity only when an agency proves that its anticompetitive conduct is a "necessary or reasonable consequence of engaging in [a state-] authorized activity," [8] or that the "legislature contemplated the kind of action

---

[8] First Am. Title Co. v. South Dakota Land Title Ass'n., 714 F.2d 1439, 1454 (8th Cir. 1983) (quoting Gold Cross Ambulance & Transfer & Standby Serv., Inc. v. City of Kansas City, 705 F.2d 1005, 1012-13 (8th Cir. 1983), cert. denied, 105 S. Ct. 1864 (1985), cert. denied, 104 S. Ct. 709 (1984); also, Cine, at 1041, above.

complained of." [9]

A state agency should generally receive antitrust immunity only if it demonstrates that its state sovereign "clearly articulated and affirmatively expressed as state policy," an intention that the agency displace competition. State agencies should be required to satisfy the same clear articulation standard as political subdivisions because neither is sovereign. Town of Hallie, at 1716. When an instrumentality of the state acts anticompetitively, "it becomes important to ensure" that the conduct "was contemplated by the State." Hoover, 471 U.S. 34 at 46. By focusing on sovereign authorization, the "clear articulation" requirement safeguards the national policy favoring competition, while allowing sovereign state bodies to regulate their economies. Town of Hallie, at 41.

Withholding Parker immunity from a state agency until it demonstrates that its anticompetitive conduct received sovereign authorization does not unduly burden the state's ability to delegate authority. This Court has concluded that applying the sovereign authorization standard to municipalities does not render a state any "'less able to allocate governmental power between itself and its political subdivisions.'" Community Communications Co. v. City of Boulder, 455 U.S. 40, 57 (1982) (quoting Lafayette, 435 U.S. at 416). Like municipalities, state agencies are sovereign delegates. It should be equally possible for federal courts to scrutinize

---

[9] Brazil v. Arkansas Bd. of Dental Examiners, 593 F. Supp. 1354, 1361 (E.D. Ark. 1984) (quoting Lafayette, 435 U.S. at 415 (quoting decision below, 532 F.2d 431, 434 (5th Cir. 1976))). Other courts have also adopted this standard. See Hybud Equip. Corp. v. City of Akron, 742 F.2d 949, 960 (6th Cir. 1984), cert. denied, 105 S. Ct. 1866 (1985); Cine, at 1041, above.

an agency's anticompetitive activities without impairing its sovereigns' ability to delegate authority.

The states may easily remedy deficient delegations of authority. As Justice Stevens noted in his dissenting opinion in Hoover v. Ronwin:

> Denial of antitrust immunity in this case would hardly leave the state helpless to cope with felt exigencies; should it wish to do so, the Arizona Supreme Court remains free to give petitioners an affirmative direction to engage in the precise conduct that respondent has alleged. The antitrust laws hardly create any inescapable burdens for the State . . . . 104 S. Ct. at 2011 (Stevens, J., dissenting).

This is in concert with this Court's position on anticompetitiveness: the Supreme Court has recognized that whether a state has clearly articulated an anticompetitive policy "is and must be a matter of federal law." Boulder, 455 U.S. at 52 n.15; see also Racetrac Petroleum, Inc. v. Prince George's County, 601 F.Supp. 892, 907 n.16 (D. Md. 1985) (the question of "whether the state has a clearly articulated state policy so as to trigger Parker immunity . . . is clearly one of federal law.").

Therefore, recognizing that the disparate lower court construction of the agency exception to the State Action Doctrine requires the issue of Writ, this Court then should adopt the position that agency action is not entitled to ipso facto immunity, on the basis of federalism alone.

ARGUMENT 3

The Position of Massachusetts, As A Market Participant, Distinguishes This Case From One of Pure State Action Immunity.

Further, the Court below failed to address the issue of private action, as opposed to state action, activity which is not protected under Parker v. Brown. Neo Gen's Brief articulates this issue: The NENSP competes in other states as a private entity and its conduct everywhere should be competitive.

The affidavit of Richard Stanton filed by the State in its Motion to Dismiss establishes that the NENSP provides service to other states and it is undeniable that they do so without any monopolistic umbrella in those states. Where the entity acts as a private entity in one state, why should it receive a differing status in its own, absent a policy so articulating that posture?

This position of Neo Gen was not addressed by the First Circuit, and begs the question to be answered, under City of Columbia, et al. v. Omni Outdoor Advertising, Inc., 499 U.S. 365 (1991), which re-stated Hoover, specifically disallowing private market

participation by a state under an umbrella of own-state established monopoly. [10]

Therefore, because Massachusetts has set about private party activity through its agency arm, the entity should be held to the level of a private party participant for purposes of the Sherman Anti-Trust Act, particularly in light of the argument against state agency action, above.

CONCLUSION

The Court of Appeals' decision in this case is inconsistent with the interpretation of Supreme Court dicta in two prior cases, and reflects a division of the lower courts in applying immunity to state agencies, under the state action doctrine. The First Circuit, in this case, has blindly adopted immunity, when principles of sovereignty and federalism demand that a stricter test be adopted. Without holding the state agencies to the strict two-prongs of the Parker test, applied to municipalities,

---

[10] City of Columbia held that: "We reiterate that, **with the possible market participant exception (emphasis added)**, any action that qualifies as state action is "ipso facto . . . exempt from the operation of the antitrust laws," [citing to Hoover at 568]. This does not mean, of course, that the States may exempt private action from the scope of the Sherman Act; we in no way qualify the well established principle that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." Parker, 317 U. S., at 351 (citing Northern Securities Co. v. United States, 193 U.S. 197, 332, 344-347 (1904)). See also Schwegmann Brothers v. Calvert Distillers Corp., 341 U.S. 384 (1951)."

this Court should require that agencies demonstrate a "clear articulation" of legislative intent before sheltering activity through anticompetitive conduct. This is particularly true where, as here, the state agency in question competes in foreign states in the same enterprise.

The Petition for a Writ of Certiorari should be granted. Otherwise, this Court will allow the unfettered monopoly of state agencies in areas where the agencies are not so chartered, or intended to be chartered, by the respective legislatures. In adopting the approach which requires "clear articulation" the appropriate balancing of sovereignty and federalism will be accommodated.

//s//

KENNETH PATRICK MCKAY, ESQ.

The Law Offices of
K. Patrick McKay, PE, Esq.
Unicorn Professional Plaza
3755 Library Rd.
Pittsburgh, PA 15234-2266
412-344-6113

Attorney for Petitioner

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 99-1100

NEO GEN SCREENING, INC.,

Plaintiff, Appellant,

v.

NEW ENGLAND NEWBORN SCREENING PROGRAM, d/b/a NEW ENGLAND REGIONAL NEWBORN SCREENING PROGRAM, UNIVERSITY OF MASSACHUSETTS, UNIVERSITY OF MASSACHUSETTS MEDICAL CENTER, HOWARD KOH, RALPH TIMPERI,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. George A. O'Toole, Jr., U.S. District Judge]

Before
Boudin, Circuit Judge,
Campbell, Senior Circuit Judge,
and Lipez, Circuit Judge.

Kenneth P. McKay with whom Law Offices of K. Patrick McKay was on brief for appellant.

Jane L. Willoughby, Assistant Attorney General, with whom Thomas F. Reilly, Attorney General, was on brief for appellees.

July 14, 1999

BOUDIN, Circuit Judge. The present appeal arises out of a federal antitrust case dismissed by the district court on the ground that it was barred by the Eleventh Amendment. We assume to be true, for purposes of this appeal, the facts as alleged in the complaint. Duckworth v. Pratt & Whitney, Inc., 152 F.3d 1, 3 (1st Cir. 1998). However, the district court also considered, as do we, uncontroverted facts furnished by affidavit pertaining to the status of the defendants under the Eleventh Amendment.

The plaintiff-appellant in this case is Neo Gen Screening, Inc., a private, for-profit Pennsylvania corporation whose business is the medical screening of newborn children. In Massachusetts, as elsewhere, newborns must be tested for specified diseases, some of which can be remedied if promptly detected. Mass. Gen. Laws ch. 111, §§ 4E, 110A; see also id. §§ 3, 5, 6. According to the complaint, Neo Gen provides hospitals in various states with screening services to detect disorders in newborns but is being prevented by the defendants from doing so in Massachusetts.

The principal defendants named in the complaint as currently amended are the University of Massachusetts, a not-

for-profit corporation linked to the state through governance and financing, its New England Newborn Screening Program ("the Screening Program"),[1] and two individuals--Howard Koh and Ralph Timperi--who are or were respectively the Commissioner of the Massachusetts Department of Public Health and an Assistant Commissioner responsible for laboratory testing. Several other defendants were named in the original complaint but later dismissed by consent.

The original complaint was filed on March 5, 1998, and contained eleven counts; but it was thereafter amended and reduced to two counts, the second of which was later voluntarily withdrawn. The remaining count (count I) is subcaptioned: "PLAINTIFF CORPORATION VS. DEFENDANTS NENSP AND UMASS VIOLATION OF THE SHERMAN ANTI-TRUST LAWS."; and it expressly charges the Screening Program and University of Massachusetts, in concert with the Massachusetts Department of Public Health, with monopolizing, attempting to monopolize and/or conspiring to monopolize "newborn screening services" in Massachusetts and surrounding states.

Although there are some collateral allegations, the main thrust of count I is an attack on the University of Massachusetts for seeking and obtaining a monopoly in the provision of the newborn screening services in Massachusetts. The only relief sought by the complaint is injunctive relief, apart from

---

[1] Although named as a defendant, the Screening Program is simply a program at the University of Massachusetts conducted through its medical school, which is also not a separate corporation. However, given our disposition, we need not pursue our doubt whether the screening program is a suable entity.

attorneys' fees, and the injunctive relief sought includes a request to bar the Commissioner and Assistant Commissioner from issuing permanent regulations that maintain the screening program's monopoly over the provision of the testing services in question. The complaint provides a history, which can be summarized briefly, as to how the supposed monopoly came about.

The Screening Program, a collection of personnel and a laboratory, had at one time been a unit of the Department of Public Health. At some point in the 1980s, the Screening Program was taken over by Tufts University and later, beginning in 1997, by the medical school of the University of Massachusetts. The Screening Program currently operates, under a contract between the University of Massachusetts and the Department of Public Health, to provide screening for specified disorders of newborn infants. A blood sample is taken by the hospital where the child is delivered and submitted to the Screening Program for testing, and a charge is paid by the hospital to the Screening Program.

In the fall of 1997, Neo Gen set about trying to persuade Massachusetts hospitals to let Neo Gen screen their newborns. It solicited hospitals in Massachusetts and purported to offer more modern, comprehensive screening at half the fee charged by the Screening Program. According to the complaint, the University of Massachusetts and its Screening Program responded by seeking adoption of regulations by the Department of Public Health that would give the Screening Program a monopoly in the provision of screening services in Massachusetts.

The complaint charges that the Screening Program "influenced" the Department of Public Health to issue emergency regulations that required testing for nine diseases and required that the blood samples be submitted to the

Department itself. See 105 C.M.R. 270.000 et seq.. Also appended to the complaint is a contract entered into between the Department of Public Health and the University of Massachusetts requiring the latter to provide newborn screening laboratory work, clinical follow-up and research services. The proposed regulations were adopted on an emergency basis in November 1997, accompanied by statements that the Department of Public Health would thereafter study the possibility of allowing other entities to perform the screening.

The defendants moved to dismiss the amended complaint as barred by the Eleventh Amendment, asserting as well that the complaint failed to state a claim under the federal antitrust laws and was barred by various antitrust doctrines. In a decision issued on December 3, 1998, the district court held that the only claim remaining in the case was count I, that this count was directed against the University of Massachusetts and the Screening Program, and that both entities were arms of the state and were entitled to dismissal under the Eleventh Amendment. This appeal followed.

Under the Eleventh Amendment, a state or an arm of the state is normally immune from suits by citizens in federal court, Edelman v. Jordan, 415 U.S. 651, 662-63 (1974); see Chemerinsky, Federal Jurisdiction § 7.4, at 403 (3d ed. 1999), unless the state waives its immunity, Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 267 (1997), or Congress overrides that immunity as it may do in limited situations, Seminole Tribe v. Florida, 517 U.S. 44, 57-68 (1996). Neo Gen has not argued either that there was any waiver of Eleventh Amendment immunity by defendants or any abrogation of that immunity by Congress.

Whether and when state universities are arms of the state for Eleventh Amendment purposes have long vexed the

federal courts. The multi-part tests that we have used are not easy to apply,[2] and, confusingly, overlap but do not quite duplicate tests that determine whether a university is an independent entity for purposes of diversity jurisdiction. Cf. University of Rhode Island v. A.W. Chesterton Co., 2 F.3d 1200, 1202-05 (1st Cir. 1993). A number of decisions have held that individual state universities are arms of the state for Eleventh Amendment purposes, but the inquiry tends to turn on facts peculiar to each university, and there are cases denying protection. See Chemerinsky, supra, § 7.4, at 407 & nn.33-34 (collecting cases).

In its decision under review, the district court explicitly found that the University in conducting the Screening Program was "acting as an agency or arm of the Commonwealth of Massachusetts." It rested this legal conclusion on a detailed discussion of the University's mission, its governance, its financial relationship to the state and similar matters. Its conclusion that the University is an arm of the Commonwealth accords with the view of another district court involving the University of Massachusetts. Daniel v. American Board of Emergency Medicine, 988 F. Supp. 127, 178-81 (W.D.N.Y. 1997).

On this appeal, Neo Gen has effectively failed to dispute the district court's holding that the University and its Screening Program are covered by the Eleventh Amendment.

---

[2] e.g., Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Authority, 991 F.2d 935, 939-40 (1st Cir. 1993) (7-factor test); In re San Juan DuPont Plaza Hotel Fire Litigation, 888 F.2d 940, 942 (1st Cir. 1989); Ainsworth Aristocrat Int'l Pty, Ltd. v. Tourism Co. of Puerto Rico, 818 F.2d 1034, 1038 & n.24 (1st Cir. 1987) (collecting cases).

Since that ruling is at least colorable and certainly not plain error, cf. Beatty v. Michael Business Machines Corp., 172 F.3d 117, 121 (1st Cir. 1999), we treat the dismissal of the case against these two defendants as conceded. However, Neo Gen argues that Koh and Timpari were also intended defendants in count I and that despite the Eleventh Amendment these state officials are subject to injunctive relief under the doctrine of Ex Parte Young, 209 U.S. 123 (1908).

Ex Parte Young is one of several major qualifications on Eleventh Amendment immunity. Chemerinsky, supra, §§ 7.5-7.7, at 411-46. Ignoring some refinements, the doctrine removes the Eleventh Amendment bar where the private suit is directed not against the state or a state agency *eo nomine* but instead against state officials acting in violation of federal law and where (in addition) retrospective damages or property transfers are not sought for official acts. Coeur d'Alene Tribe, 521 U.S. at 269, 277-80; Strahan v. Coxe, 127 F.3d 155, 166-67 (1st Cir. 1997), cert. denied, 119 S. Ct. 81 (1998); Chemerinsky, supra, at § 7.5, at 411-30. This exception is Neo Gen's main argument on this appeal.

The Commonwealth replies that the claims in count I were asserted only against the University of Massachusetts and the Screening Program and that no relief was sought under that count against the two named state officers. That is certainly what the district court thought, and its view is supported by the subcaption of the count (quoted above), which referred to those institutional defendants and no others. By contrast, count II, which was voluntarily withdrawn, specifically mentions Koh and Timperi as defendants in the corresponding subcaption

Neo Gen counters that state officials were named as defendants in the complaint, that the Department of Public Health itself is mentioned in count I, that complaints are liberally construed, and that at worst it is entitled to leave to

amend. The latter claim fails since leave to amend was not requested in the district court, but the construction of count I in its present form is open to reasonable dispute. We think that the injunctive relief against the two state officials is so clearly barred for a substantive reason that we prefer to affirm on that ground rather than because of a possible pleading error.

It is quite true that Ex Parte Young avoids the Eleventh Amendment defense where prospective injunctive relief, not involving damages or property transfer, is sought against named state officials for a violation of federal law. See Coeur d'Alene Tribe, 521 U.S. at 276-77. Usually, such injunctions are sought to require compliance with the Constitution; but the Ex Parte Young doctrine is equally applicable to compel state officials to comply with a valid federal statute that must be obeyed under the Supremacy Clause of the Constitution. Id. at 273-77. Thus, if the state officials were violating the Sherman Act, in principle the Eleventh Amendment would not bar injunctive relief against them.

The difficulty for Neo Gen is that it is clearly established that the Sherman Act does not itself apply to state action. In Parker v. Brown, 317 U.S. 341, 350-51 (1943), the Supreme Court determined that Congress had not meant to require states to comply with the Sherman Act. Accordingly, a state is free to regulate, or act on its own behalf, in ways that are anti- competitive and would not be permitted to a private individual. Id. This doctrine is so well settled that its rationale and underpinnings are scarcely worth discussing. See I Areeda & Hovenkamp, Antitrust Law, ¶¶ 221- 222 (1997).

No doubt the emergency regulations, coupled with the ten-year renewable contract already described, create an effective monopoly for the University of Massachusetts in conducting the screening of Massachusetts newborns. By regulation, the blood must be made available to the

Department, and the Department has chosen to contract with the University to do the testing. Although a hospital could also choose to engage Neo Gen, no hospital is likely to pay twice for the same service. But a regulation or purchase of services made by the state is classic state action immunized from the Sherman Act. Cf. Hoover v. Ronwin, 466 U.S. 558, 567-73 (1984); Tri-State Rubbish, Inc. v. Waste Management, Inc., 998 F.2d 1073, 1076 (1st Cir. 1993).

Neo Gen mistakenly attempts to distinguish Parker v. Brown and the long line of cases that have followed it by arguing that the Massachusetts legislature did not "clearly articulate" a purpose to supplant competition with monopoly. The cases on which Neo Gen relies, such as City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365 (1991), and City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978), do impose a requirement of this kind (the details are not important here) where the acts sought to be shielded under Parker v. Brown are those of municipalities or other local public entities. But no such requirement exists where the acts are those of the state itself. Hoover, 466 U.S. at 568.

Whether executive branch action is that of the state is a different issue. The Supreme Court has held that acts of the state legislature or state supreme court are protected under Parker, but it reserved decision as to whether state-level executive branch departments or agencies are entitled to similar treatment. Hoover, 466 U.S. at 568 n.17 (reserving question). However, both circuits that have squarely faced the issue have extended Parker's ordinary protection to actions of the state executive branch.[3] We agree, with possible caveats that do not

---

[3] Charley's Taxi Radio Dispatch Corp. v. Sida of Hawaii, Inc., 810 F.2d 869, 875-76 (9th Cir. 1987) (state department of transportation); Deak-Perera Hawaii, Inc. v. Department

affect the outcome in this case.

Broadly speaking, the Parker doctrine represents a judgment by the Supreme Court that, in regulating anti-competitive business conduct, Congress was not seeking to regulate the states themselves; and "the states" include their executive branches quite as much as their legislatures and their courts. The municipalities have been given less protection under Parker on the stated ground that technically speaking, they are not "the state," Lafayette, 435 U.S. at 412-13, while the status of state boards or commissions is open to dispute, see Areeda, supra, ¶ 224; id. ¶ 212.2d at 141 & n.48 (1992 Supp.). And there is still less of an analogy to private carriers or utilities, operating under some measure of state supervision, whose protection under Parker is even more restricted. Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 57-62 (1985).

The question remains whether and to what extent a plaintiff should be able to pierce the Parker defense on the ground that the state official or agency was acting in excess of his (or its) authority under state law. On the one hand, the Supreme Court has made clear that the Eleventh Amendment is not to be avoided under Ex Parte Young merely in order to enforce state law. Pennhurst State School & Hosp. v.

---

of Transportation, 745 F.2d 1281, 1282-83 (9th Cir. 1984) (same), cert. denied, 470 U.S. 1053 (1985)); Saenz v. University Interscholastic League, 487 F.2d 1026, 1027-28 (5th Cir. 1973) (division of University of Texas); compare Cine 42nd Street Theater Corp. v. Nederlander Org., Inc., 790 F.2d 1032, 1044-46 (2d Cir. 1986); see generally I Areeda & Hovenkamp, supra, ¶ 224b2, at 411-415; id. ¶ 212.2d (1992 Supp.).

Halderman, 465 U.S. 89, 106 (1984). On the other hand, extreme cases can be imagined: suppose a state executive official entered into an exclusive-dealing contract for the state that would violate the principles of Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320 (1961), if done by a private party, and suppose further that the state legislature had expressly banned such a contract.

We need not resolve such conundrums here. Neo Gen argues that the Massachusetts legislature did not expressly approve or authorize the kind of regulation or contract involved in this case; but we have rejected a "clear articulation" test as applied to the state's executive branch, at least where a full-fledged department is concerned. Given the Commonwealth statutes that authorize testing, there is nothing extraordinary or unforeseeable about the Department of Public Health's regulation requiring testing or its decision to do the testing itself or through a chosen instrument. Even if a patent lack of authority could ever be an exception to Parker, it is certainly not so in a case of this kind.

There are a scattering of other allegations in count I in addition to the charge that the University of Massachusetts sought and acquired a monopoly over newborn screening. These include claims that the "defendants" fixed the price of services at $42 per infant (whereas Neo Gen offered testing at $25), and that the defendants "influenc[ed]" the adoption of the regulations.[4] These undeveloped allegations are not pursued in

---

[4] But cf. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769 (1984) (coordination within a firm is not "price fixing" prohibited by the antitrust laws), and Eastern R.R. Pres. Conf. v. Noerr Motor Freight, 365 U.S. 127 (1961) (petitions to the government, if not mere "shams," do not give rise to antitrust liability).

Neo Gen's brief and deserve no further comment. King v. Town of Hanover, 116 F.3d 965, 970 (1st Cir. 1997).

It may be, as Neo Gen charges, that the defendants' actions reflect a cozy arrangement that gives newborns inferior screening at higher cost and that everyone--except possibly the Screening Program--would be better off if hospitals could contract competitively for screening services, just as they procure drugs, bandages, and other resources. The state, in turn, says that its contract provides for extra research and follow-up that Neo Gen fails to provide; such cross-subsidy arguments are traditional defenses for monopoly but not invariably without merit. At bottom, this is a policy matter to be resolved by the Commonwealth.

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 98-10394-GAO

NEO GEN SCREENING, INC.,
Plaintiff

v.

NEW ENGLAND NEWBORN SCREENING PROGRAM, UNIVERSITY OF MASSACHUSETTS MEDICAL CENTER;
UNIVERSITY OF MASSACHUSETTS, INC.; HOWARD KOH,
Commissioner, Department of Public Health; and RALPH TIMPERI,
Assistant Commissioner, Department of Public Health,
Defendants

MEMORANDUM AND ORDER
December 3, 1998

O'TOOLE, D.J.

The original complaint in this case slated eleven claims against various combinations of nine defendants. The plaintiff timely filed an amended complaint that voluntarily dismissed all but two of the original counts. The defendants then moved to dismiss the amended complaint for lack of subject matter jurisdiction, Fed. R. Civ. P. 12(b)(1), and for failure to state a claim, Fed. R. Civ. P. 12(b)(6). In its opposition, the plaintiff indicated that it would voluntarily dismiss one of the two remaining counts. Pl.'s Resp. to Mot. To Dismiss ¶ 3, at 2. As

a result, the only surviving claim is against the University of Massachusetts Medical School ("UMass") and its New England Newborn Screening Program ("NENSP"), alleging violation of the Sherman Anti-Trust Act, 15 U.S.C. § 2. Am. Compl. Count 1, at 11.

Factual Background

Massachusetts requires mandatory screening of newborn children for certain inheritable disorders. As of February, 1999, new regulations of the Massachusetts Department of Public Health ("DPH") will go into effect, authorizing screening for thirty disorders. All newborn screening in Massachusetts is conducted by NENSP, which has been, since 1997, a UMass program.

The plaintiff, Neo Gen Screening, Inc. ("Neo Gen"), is a Pennsylvania corporation that provides "state-of-the-art" testing of newborn infants to detect signs of any of the thirty disorders covered by the new Massachusetts regulation. Am. Compl ¶¶ 3, 5. In late 1997, Neo Gen sent Massachusetts hospitals a letter advertising its services and promising to provide more tests, at lower cost, than NENSP. The burden of Neo Gen's claim is that the defendants conspired to persuade the DPH to adopt regulations that will require all testing in Massachusetts to be done by NENSP, effectively granting NENSP a "monopoly" and shutting Neo Gen out of the market for testing within Massachusetts.

The defendants advance several reasons why the complaint should be dismissed. It is sufficient to address just one: because UMass, in running NENSP, is acting as an agency or arm of the Commonwealth of Massachusetts, this Court is deprived of jurisdiction to entertain the action by the Eleventh Amendment to the Constitution of the United States.

The Eleventh Amendment

The Eleventh Amendment prohibits suits against States in the federal courts, unless the State has consented to such

suit, see Ford Motor Co. v. Department of Treasury of Indiana, 323 U.S. 459, 462.63 (1945), or unless Congress has expressly abrogated that immunity pursuant to constitutional authority to do so. See Seminole Tribe Tribe of Florida v. Florida, 517 U.S. 44, 55 (1996); Green v. Mansour, 474 U.S. 64, 68 (1985). This immunity extends to suite against a state agency as well as to suits directly against the State *eo nomine*. See Alabama v. Pugh, 438 U.S. 781, 782 (1978). However, a state agency is not always or necessarily entitled to Eleventh Amendment immunity. Whether it has the benefit of immunity depends on whether the agency is "an arm [or alter ego] of the State partaking of the State's Eleventh Amendment immunity, or is instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment immunity, or is instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend." Ainsworth Aristocrat Int'l Pty. Ltd. V. Tourism Co. of Puerto Rico, 818 F.2d 1034, 1036 & n.2 (1st Cir. 1987) (internal quotations omitted) (quoting Mt. Healthy City School Dist. Bd. Of Educ. V. Doyle, 429 U.S. 274, 280 (1977)). Factors that bear on such a determination include how local law and decisions define the status and nature of the agency in relation to the sovereign; whether payment of any judgment will be made from the state treasury, or whether the agency has the funds or power to satisfy the judgment; whether the agency is performing a governmental or proprietary function; whether the agency has been separately incorporated; the degree to which the agency is autonomous in its operations; whether it has the power to sue and be sued and to enter into contracts; whether its property is exempt from state taxation, and whether the State has immunized itself from responsibility for the agency's operations. Ainsworth, 818 F.2d at 1037. Consideration of these factors leads to the conclusion that UMass and NENSP have the benefit of Eleventh Amendment immunity from suit in the federal courts.[5]

---

[5] In evaluating a Rule 12(b)(1) motion to dismiss challenging the court's subject matter jurisdiction, the court may refer to evidence outside the pleadings to resolve disputed

Analysis

Massachusetts law requires that newborn children be tested for certain treatable genetic or biochemical disorders and infectious diseases, subject to rules promulgated by the Department of Public Health (the "DPH"). Mass. Gen. Laws ch. 111, § 110A. In addition, the DPH is directed to establish a program to combat mental retardation in children and is authorized to conduct such program "in conjunction with any foundation or scientific organization, hospital or medical school or with an agency of the federal government." Mass. Gen. Laws ch. 111, § 4E.

Fulfilling this statutory mandate, the DPH has maintained a Newborn Screening Program in one form or another since 1962. Timperi Aff. ¶ 4. Regulations adopted by the DPH govern the conduct of such screening. 105 CMR 270.000 *et. seq.* In July, 1997, the DPH entered into an agreement with UMass pursuant to which UMass undertook to operate the screening program. Timperi Aff. ¶ 7; Stanton Aff. ¶ 4 and attachment. The defendant NENSP is not a separate legal entity, but rather is a program within the UMass Medical School. Stanton Aff. ¶ 3. Indeed, the UMass Medical School itself is not a separate corporate entity, but rather is a division of the University of Massachusetts. Id.; see Mass. Gen. Laws ch. 75, § 34 (directing trustees of University to establish medical school).

The operating funds for the Medical School, as for the University as a whole, are appropriated by the Massachusetts legislature and administered by the University trustees. Mass. Gen. Laws ch. 75, §§ 8, 12. The trustees are required to submit proposed budgets to various state officials, including the Board of Higher Education, the Secretary of Administration and Finance, and the legislative committees on ways and means. Mass. Gen. Laws ch. 15A, § 15B. The trustees may also

---

jurisdictional fact issues. See, e.g., Washington v. Norton Mfg., 588 F.2d 441, 443 (5th Cir.), cert. denied, 442 U.S. 942 (1979); Daniel v. American Bd. Of Emergency Medicine, 988 F. Supp. 127, 150 (W.D.N.Y. 1997).

maintain special trust funds for income-producing projects, but all income from such projects must be held in trust for the specific purpose for which the fund was established. Mass. Gen. Laws ch. 75, § 11. Employees of the University are considered employees of the Commonwealth. Id., § 14.

The fees NENSP may charge for its services are regulated to some extent by the DPH. Under the agreement between the DPH and UMass, the charge to Massachusetts hospitals for the services performed by NENSP must be "the lowest feasible charge that covers all associated costs of providing this service." Stanton Aff., Attach., Agreement ¶ IV(A)(3). UMass must notify DPH at least thirty days before it makes any change in the charges. Id. Although the agreement does not expressly require DPH approval of a change in fees, the notice requirement coupled with the ability of DPH to terminate the agreement prior to its expiration, see Agreement ¶ XI(C), creates a strong practical influence by the DPH on the level of charges.

The conclusion is clear. In carrying out a legislatively established public health mandate through NENSP, UMass acts as an agency of the Commonwealth, rather than as a separate, proprietary enterprise. Decisional law confirms this. Although no precedent within this Circuit has directly held that UMass is entitled to Eleventh Amendment immunity, one of our sister District Courts has no held. Daniel, 988 F. Supp. at 180-81. Moreover, the First Circuit followed Massachusetts precedents in holding that UMass. Under earlier law, was entitled to common law sovereign immunity from a tort claim. See Cantwell v. University of Mass., 551 F. 2d 879, 880 (1st Cir. 1977), following *inter alia,* Hannigan v. New Gamma-Delta Chapter of Kappa Sigma Fraternity, 327 N.E.2d 882 (Mass. 1975). After the partial abrogation of sovereign immunity accomplished by the enactment of the state tort claims act, the state courts have concluded that the University of Massachusetts is a state agency within the scope of that statute. See McNamara v. Honeyman, 546 N.E.2d 139, 142 (Mass.

1989) (stating that University "is an agency of the State, and not a separate entity" for purposes of tort claims act); Robinson v. Commonwealth, 584 N.E.2d 636, 638 (Mass. App. Ct.) (holding that university "is an agency of the Commonwealth" for purposes of tort claims), *further review denied*, 588 N.E.2d 691 (1992). Finally, just as UMass's waiver of immunity from suit follows the state's waiver of immunity from suit under the state tort claims act. Massachusetts courts have held that where the state's sovereign immunity has not been waived or abrogated with respect to some issues, as to those issues, the University may still invoke that immunity. See, e.g., Chapman v. University of Mass. Medical Ctr, 670 N.E.2d 166, 167-68 (Mass. 1996) (holding that sovereign immunity bars recovery of postjudgment interest from university).

All these factors coalesce to form a firm foundation for the conclusion that in carrying out the screening program through NENSP, UMass acts as an arm of the Massachusetts state government and as such is within the scope of immunity from suit in the federal courts afforded by the Eleventh Amendment. UMass has not waived its immunity, nor has Congress abrogated it. See generally Seminole Tribe, 517 U.S. at 55 (applying test for Congressional abrogation of Eleventh Amendment). The remaining claim against UMass (and NENSP) must be dismissed.

It is SO ORDERED.

//s//

George A. O'Toole, J.

(2)

Supreme Court, U.S.
FILED
NOV 12 1999
CLERK

No. 99-617

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

NEO GEN SCREENING, INC.,
Petitioner,

v.

NEW ENGLAND NEWBORN SCREENING PROGRAM, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

THOMAS F. REILLY
Attorney General
of Massachusetts

JANE L. WILLOUGHBY*
Assistant Attorney General
1 Ashburton Place, Room 2019
Boston, Massachusetts 02108
(617) 727-2200, ext.2615
**Counsel of Record*

23 pp

Question Presented

Whether the United States Court of Appeals for the First Circuit correctly concluded that, in promulgating regulations for screening newborn children for certain disorders in the Commonwealth of Massachusetts, the Massachusetts Department of Public Health was exempt from the operation of section 2 of the Sherman Act.[1]

---

[1] The petition suggests that the Court of Appeals resolved an Eleventh Amendment issue in this case. Petition for Writ of Certiorari ("Pet.") at i. To the contrary, the Court expressly declined to reach the Eleventh Amendment issues because petitioner conceded on appeal that the University of Massachusetts was entitled to the protections afforded by the Eleventh Amendment. Appendix A to Pet. at 6-7.

Parties.

The petition states that the Massachusetts Department of Public Health (the "Department") is a respondent in this case. Pet. at ii. To the contrary, the Department was never named as a party to this litigation. Appendix A to Pet. at 2-3. The parties are Neo Gen Screening, Inc, petitioner; and the University of Massachusetts; the University of Massachusetts Medical Center; the New England Newborn Screening Program; Howard Koh, M.D., Commissioner of the Department; and Ralph Timperi, Assistant Commissioner of the Department, respondents.

Table of Contents.

Table of Authorities v

Decisions Below 2

Jurisdiction 2

Constitutional and Statutory Provisions 2

Statement of the Case 5

I. Proceedings Below 5

Reasons for Denying the Writ 6

I. THERE IS NO SUBSTANTIAL CONFLICT OF DECISIONS TO WARRANT CERTIORARI. 7

A. *The Parker Immunity Doctrine Exempts The Department's Regulations from the Sherman Act.* 7

B. *No Real and Embarrassing Conflict Exists Among the Circuits Which Have Decided this Issue.* 9

II. THIS CASE PRESENTS NO SIGNIFICANT ISSUE OF FEDERAL LAW REQUIRING RESOLUTION BY THIS COURT. 13

Conclusion 14

Table of Authorities.

Cases.

Automated Salvage Transport, Inc. v. Wheelabrator Environmental Systems, Inc., 155 F.2d 59 (2d Cir. 1998) 11

California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) 8

Charley's Taxi Radio Dispatch v. SIDA of Hawaii, Inc., 810 F.2d 860 (9th Cir. 1987) 9, 10

Cine 42nd Street Theater Corp. v. Nederlander Organization, Inc., 790 F.2d 1032 (2d Cir. 1986) 9, 10, 11

City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365 (1991) 13

Earles v. State Board of Certified Public Accountants of Louisiana, 139 F.3d 1033 (5th Cir.), cert. denied, 119 S. Ct. 444 (1998) 10 n.7

Hertz Corp. v. City of New York, 1 F.3d 121 (2d Cir. 1993), cert. denied, 510 U.S. 1111 (1994) 7

Hoover v. Ronwin, 466 U.S. 558 (1984) 7

In re Woods, 143 U.S. 202 (1892) 6

Parker v. Brown, 317 U.S. 341 (1943) 7, 8, 11, 12, 13

Rice v. Sioux City Cemetery, 349 U.S. 70 (1955) 12

Saenz v. University of Interscholastic League, 487 F.2d 1026 (5th Cir. 1973) 9, 10

Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985) 8, 9 &n.6, 11 n.8, 13 n.12

Tri-State Rubbish, Inc. v.
Waste Management, Inc.,
998 F.2d 1073 (1st Cir. 1993) 7

Constitutional Provisions, Statutes,
Regulations & Court Rules.

Federal

U.S. Const., Art. VI, cl. 2 3

15 U.S.C. § 1 5 n.3

15 U.S.C. § 2 2, 3, 5 n.3

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2106 2

Supreme Court Rule 10 6

Supreme Court Rule 15 1

State

Mass. Gen. Laws c. 111, § 4E 3, 12 n.10

Mass. Gen. Laws c. 111, § 110A 3, 4, 12 n.10

105 Code of Massachusetts Regulations § 270.007(B) 4 n.2

105 Code of Massachusetts Regulations § 270.004 5

No. 99-617

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

NEO GEN SCREENING, INC.,
Petitioner,

v.

NEW ENGLAND NEWBORN SCREENING PROGRAM, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Pursuant to Supreme Court Rule 15, the respondents New England Newborn Screening Program, the University of Massachusetts, the University of Massachusetts Medical Center, Howard Koh, and Ralph Timperi (collectively "respondents") submit this brief in opposition to the petition for writ of certiorari.

Decisions Below

The opinion of the United States Court of Appeals for the First Circuit, reproduced at pages 1-12 of Appendix A to the petition, is reported at 187 F.3d 24 (1st Cir. 1999). The earlier decision of the United States District Court for the District of Massachusetts is unreported, and it is included in Appendix B to the petition at pages 13-18.

Jurisdiction

The opinion of the United States Court of Appeals for the First Circuit was entered July 14, 1999. See Appendix A to Pet. at 2. The petition was filed October 7, 1999, was received by respondents on October 11, 1999, and was docketed on October 12, 1999. The petitioner invokes the Court's jurisdiction pursuant to 28 U.S.C. §§ 1254(1) and 2106.

Constitutional and Statutory Provisions

The federal constitutional and statutory provisions at issue are the Supremacy Clause of the United States Constitution, and section 2 of the Sherman Act, 15 U.S.C. § 2.

The Supremacy Clause provides as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., Art. VI, cl. 2.

Section 2 of the Sherman Act provides as follows:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,0000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2.

As to the relevant Massachusetts statutes, the Commonwealth sets forth the full text of Mass. Gen. Laws c. 111, §§ 4E and 110A, as follows:

> Section 4E. The department of public health is hereby authorized and directed to establish a program to combat mental retardation in children suffering from a genetic defect causing phenylketonuria. The said program may be conducted in conjunction with any foundation or scientific organization, hospital or medical school or with an agency of the federal government. The department may accept for such purpose any special grant of money, services or property from the federal government or any of its agencies or from any such foundation, organization or medical school.

> Section 110A. The physician attending a newborn child shall cause said child to be subjected to tests for phenylketonuria, cretinism and such other specifically treatable genetic or biochemical disorders or treatable infectious diseases which may be determined by testing as specified by the commissioner. The commissioner may convene an advisory committee on newborn screening to assist him in determining which tests are necessary.
>
> The department shall make such rules pertaining to such tests as accepted medical practice shall dictate.
>
> The provisions of this section shall not apply if the parents of such child object thereto on the grounds that such test conflicts with their religious tenets and practices.

The Massachusetts regulation at issue is 105 Code of Massachusetts Regulations § 270.007(B) which states:

> The blood specimen shall be collected from the newborn using the form and filter paper provided by the Department, and delivered to the Department within 24 hours of collection according to the accompanying instructions or directions provided on the form and other supplemental information that may be provided by the Department. All information requested

must be provided on the form.[2]

Statement of the Case

I. PROCEEDINGS BELOW.

Petitioner Neo Gen Screening, Inc., challenged regulations promulgated by the Massachusetts Department of Public Health (the "Department") on the grounds that they violated section 2 of the Sherman Act.[3] It claimed that the regulations, which require that certain newborn screening[4] be conducted by the Department or by the Department's designated agent, constituted a form of illegal monopolization.[5]

---

[2] 105 Code of Massachusetts Regulations § 270.004 defines "Department" as the Department or its designated agent.

[3] The Sherman Act provides in relevant part that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony." 15 U.S.C. § 2. Petitioner's apparent reliance on section 1 of the Sherman Act, 15 U.S.C. § 1, is puzzling, since its claim is one of monopolization.

[4] Newborn screening is a process by which newborn children are tested for certain inheritable disorders. Appendix B to Pet. at 14.

[5] Petitioner maintains at page 4 of the petition that the 1989 proposed regulations for the first time created a monopoly by

The petitioner appealed from the District Court's decision granting the respondents' motion to dismiss the amended complaint. The United States Court of Appeals for the First Circuit affirmed the District Court's decision. The Court of Appeals held that, because the Department, an executive department of state government, had acted as the state in promulgating the regulations, the Department was exempt from the Sherman Act's prohibitions, without further inquiry. Appendix B to Pet. at 8-9.

The petitioner filed a petition for writ of certiorari on or about October 8, 1999.

Reasons for Denying the Writ

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." U.S. Supreme Court Rule 10. The Court will grant such a writ "only for compelling reasons." Id. The purpose of certiorari jurisdiction is to permit the Court to select cases "of such gravity and general importance" as to warrant plenary review. In re Woods, 143 U.S. 202, 206 (1892). Accordingly, a "petition . . . is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." U.S. Supreme Court Rule 10.

For the reasons set forth below, the petition does not satisfy the traditional criteria which guide the Court's discretionary

---

the Department of certain newborn screening. This is incorrect. Since at least 1962, certain newborn screening in the Commonwealth has been performed by the Department or its designated agent. Appendix B to Pet. at 14, 16.

review, and it should be denied.

I. THERE IS NO SUBSTANTIAL CONFLICT OF DECISIONS TO WARRANT CERTIORARI.

A. *The Parker Immunity Doctrine Exempts the Department's Regulations from the Sherman Act.*

"Under principles of federalism and state sovereignty, a state actor is accorded absolute immunity from antitrust liability." Hertz Corp. v. City of New York, 1 F.3d 121, 128 (2d Cir. 1993), cert. denied, 510 U.S. 1111 (1994).

> A half century ago, the Supreme Court determined, in Parker v. Brown, 317 U.S. 341, . . . (1943), that Congress had not intended the federal antitrust laws to apply to trade restraints or monopolies imposed by state governments. Although the antitrust laws aim at competitive markets, the Court in Parker recognized that governments often restrict competition for public purposes. The actions of state governments, no less than those of the federal government itself, were deemed not to fall within the constraints of the antitrust laws.

Tri-State Rubbish, Inc. v. Waste Management, Inc., 998 F.2d 1073, 1076 (1st Cir. 1993). "[W]hen a state legislature adopts legislation, its actions constitute those of the State, . . . and ipso facto are exempt from the operation of the antitrust laws." Hoover v. Ronwin, 466 U.S. 558, 567-68 (1984). In Hoover, the Court stated that the "reason that state action is immune from Sherman Act liability is not that the State has chosen to act

in an anti-competitive fashion, but that the State itself has chosen to act." Id. at 574. Similarly, the First Circuit in this case determined that, when an executive department of the Commonwealth promulgates regulations limiting the provision of certain newborn screening services to the Department or the Department's designated agent, it is protected under Parker. Appendix A to Pet. at 8-9.

In this case, the Department determined that the provision of certain newborn screening services in the Commonwealth could be done most effectively where the state provides that service itself, either by the Department or by the Department's designated agent. This is not "illegal" under the antitrust laws. The state has expressed a preference for (1) newborn screening services (2) to be provided by the Department as the Department sees fit. This activity, even if "anticompetitive" in some sense, is nonetheless by definition authorized by the state. Therefore, no "violation" of the antitrust laws exists.

Under Parker, and its progeny, even when a private actor (of which there are none in this case) engages in anticompetitive conduct, he receives immunity from the antitrust laws (1) if he engages in the activity pursuant to a clearly articulated and affirmatively expressed state policy and (2) if the anticompetitive activity is actively supervised by the state. California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97 (1980). However, some entities and persons are not subject to both prongs of the Midcal test. For example, in Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985), the Supreme Court held that municipalities were subject only to the "clear articulation test" and not the active

supervision test.[6] Here, the Court of Appeals held that neither prong of the state action doctrine applies to an executive department, which the Court held to be the equivalent of the state when it promulgates regulations. Appendix A to Pet. at 8-9.

B. *No Real and Embarrassing Conflict Exists Among the Circuits Which Have Decided this Issue.*

The petition asserts that there is a conflict among the circuit courts concerning the question of whether a state executive department is, like a state, ipso facto immune from the operation of the antitrust laws, or whether it is, like a municipality, subject to the foreseeability test embodied in Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985). Pet. at 7.

The First Circuit's decision that state executive departments are not subject to the Sherman Act is consistent with earlier decisions by the Courts of Appeal in the Fifth and Ninth Circuits. See Charley's Taxi Radio Dispatch v. SIDA of Hawaii, Inc., 810 F.2d 869 (9th Cir. 1987); Saenz v. University Interscholastic League, 487 F.2d 1026 (5th Cir. 1973). The only case that plaintiff relies on to establish a conflict with the Neo Gen decision, Cine 42nd Street Theater Corp. v. Nederlander Organization, Inc., 790 F.2d 1032 (2d Cir. 1986), Pet. at 7, was subsequently interpreted by the United States Court of Appeals for the Second Circuit in a way which lessens any perceived conflict between it and cases in the Fifth and Ninth Circuits cited by the First Circuit.

---

[6] Petitioner's suggestion to the contrary, Pet. at 17-18, is simply wrong. Town of Hallie, 471 U.S. at 47.

In Charley's Taxi, a case involving the Hawaii Department of Transportation, the United States Court of Appeals for the Ninth Circuit held that "state executives and executive agencies, like the state supreme court, are entitled to Parker immunity for actions taken" within their lawful authority, regardless of whether the particular actions at issue or their anticompetitive effects were contemplated by the legislature. 810 F.2d at 876. The Court did not address the question of whether state entities that were less than executive agencies would partake of that immunity. In Saenz, the United States Court of Appeals for the Fifth Circuit held that the University Interscholastic League is an agency of the State of Texas and therefore exempt from section 1 of the Sherman Act. 487 F.2d at 1027. The Court analyzed the League's organizational form and function as part of the University of Texas, an arm of the State, and concluded that it was sufficiently tied to the state to constitute the state for antitrust purposes. 487 F.2d at 1027-28. Again, the Court did not address the nature of agencies in general.[7]

In Cine 42nd Street Theater Corp. v. Nederlander Organization, Inc., 790 F.2d 1032 (2d Cir. 1986), the United States Court of Appeals for the Second Circuit held that the Urban Development Corporation of New York State was not exempt from the Sherman Act as if it were the state, but rather was required to demonstrate a "clearly expressed state policy that authorizes its actions." 790 F.2d at 1043 (quotation

---

[7] Compare Earles v. State Board of Certified Public Accountants of Louisiana, 139 F.3d 1033 (5th Cir.) (so long as Board is acting within its authority and pursuant to a clearly established state policy, there is no need for active supervision of the exercise of properly delegated authority), cert. denied, 119 S. Ct. 444 (1998).

omitted). Twelve years later, in Automated Salvage Transport, Inc. v. Wheelabrator Environmental Systems, Inc., 155 F.3d 59 (2d Cir. 1998), the court clarified its holding in Cine 42nd Street. In Automated Salvage Transport, the court stated that that its holding in Cine 42nd Street was based on the fact that New York's Urban Development Corporation had nearly absolute operational autonomy and because a high level of participation by the state was missing. 155 F.3d at 71. In Automated Salvage, the Second Circuit held that those characteristics did not apply to the Connecticut Resources Recovery Authority because the Authority was subject to regulation by the state's Commissioner of Environmental Regulation. 155 F.3d at 71. The Court held that this fact could be a basis for a determination that the Authority was the equivalent of the state for purposes of the antitrust laws. Id. It left this question open, holding ultimately that the Authority's activity was exempt under the foreseeability test. 155 F.3d at 74.

These holdings can largely be reconciled by recognizing that state agencies possess different characteristics such that some of them will be exempt from the antitrust laws, while others might have to demonstrate that their activities were the clearly foreseeable result of a legislative command.[8] The First Circuit's Neo Gen holding is an example of the application of this principle. Neo Gen held that the Department's immunity did

---

[8] Indeed, when a state agency acts, it is arguably entitled to even more protection than that afforded municipalities by the Hallie test. It would be inconsistent with Parker -- which rests on principles of federalism -- to give less (or even the same) protection to states which are, unlike municipalities, protected by the United States Constitution.

not depend on the foreseeability test because it is a full-fledged executive department, Appendix A to Pet. at 11, but it left open the question of whether there may be instances where a state entity may not merit treatment as the state for antitrust purposes. Id.[9] It is important to note that the Court also regarded the foreseeability test as having been met, in stating that "[g]iven the Commonwealth statutes that authorized [newborn] testing, there is nothing extraordinary or unforeseeable about the Department of Public Health's regulation requiring testing or its decision to do the testing itself or through a chosen instrument. Even if a patent lack of authority could ever be an exemption to Parker, it is certainly not so in a case of this kind." Appendix A to Pet. at 11.[10] Thus, no substantial conflict exists among the cases cited by petitioner.

To the extent that there is any perceived conflict among these decisions, this does not support plenary review at this time. See Rice v. Sioux City Cemetery, 349 U.S. 70, 79 (1955) (conflict in lower courts will not justify review unless it is "real and embarrassing") (emphasis added) (citation omitted).

---

[9] The cases petitioner cites at 13 n.8 and 14 n.9 are illustrations of this principle.

[10] See Mass. G.L. c. 111, §§ 4E and 110A.

II. THIS CASE PRESENTS NO SIGNIFICANT ISSUE OF FEDERAL LAW REQUIRING RESOLUTION BY THIS COURT.

Because the challenged regulations do not conflict with the Sherman Act, either because, under Parker, the Sherman Act does not apply or because the foreseeability test is met, this case presents no significant issue of federal law requiring resolution by the Court.[11] Neo Gen is perfectly consistent with this Court's prior decisions in this area. "The rationale of Parker was that, in light of our national commitment to federalism, the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators." City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 375 (1991).[12]

---

[11] Petitioner's claim that the New England Newborn Screening Program is a private entity, Pet. at 16, is simply incorrect. As the First Circuit noted in its opinion, "[a]lthough named as a defendant, the Screening Program is simply a program at the University of Massachusetts conducted through its medical school, which is also not a separate corporation." Appendix A to Pet. at 3, n.1.

[12] While dictum in Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985), left open the question of whether and to what extent a state agency might be subject to at least one prong of the state action doctrine, foreseeability and active supervision, that case involved a municipality, not a state agency. In the absence of a real, substantial conflict, the issue of the validity of the Department's regulations is not an issue of national importance, warranting the review of this Court.

Conclusion.

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the First Circuit should be denied.

Respectfully submitted,

NEW ENGLAND NEWBORN SCREENING PROGRAM, et al.

By their attorney,

THOMAS F. REILLY
ATTORNEY GENERAL

Jane L. Willoughby BBO # 555693
Assistant Attorney General
Counsel of Record
Government Bureau
One Ashburton Place, Rm. 2019
Boston, Massachusetts 02108
(617) 727-2200, ext. 2615
Fax: (617) 727-5785

Dated: November 10, 1999